ONG & CO. PTE. LTD.

v.

ONG SAY YAUN

HIGH COURT MALAYA, KUALA LUMPUR
VC GEORGE J
[CIVIL SUIT NO. C 788 OF 1982]
28 OCTOBER 1983

CIVIL PROCEDURE: *Service of writ - Setting aside judgment in default - Defendant taking fresh steps after alleging procedural irregularities.*

The writ was issued on 29 April 1982 and served on 31 May 1982 for which an affidavit of service of the writ was filed. Judgment in default was thereafter entered on 10 June 1982. On 4 August 1982 the defendant purported to enter an appearance, whereupon the defendant's solicitors upon being informed of the judgment in default, firstly, applied to set aside the judgment and secondly, made a separate application to stay the execution of judgment.

The defendant/applicant's contention was firstly that the proof of service did not follow the High Court Rules in the specified form and secondly, that there was a defence on merits. The plaintiff's contentions were four-fold:

(i) that the failure of the affidavit of service not being in Form 137 (a) was a mere irregularity and should be ignored.

(ii) that the defendant allegedly admitted the service of the writ.

(iii) the irregularities relied on in the application to set aside were not stated in the said summons amounting to a waiver.

(iv) that fresh steps had been taken by the defendant by filing a further affidavit and that he has argued the case on merits. Hence, the judgment should stand.

Held:

[1] The Court has a wide discretion to get round non-adherence to the Rules but will do so only if nothing significant turns on such non-adherence.

[2] Form 137 of the High Court Rules requires that the person to be served was personally known, had been pointed out to him or admitted to him that he was the person to be served. As this requirement was left out in the affidavit of service, and as it casts doubt as to the propriety of service, there was no basis for entering the said judgment in defaults.

[3] The failure of the defendant/applicant in stating the irregularities relied on in the summons to set aside was corrected on being stated in the affidavit referred to in the summons.

[4] In certain circumstances, the taking of fresh steps can put paid to a party's procedural rights if the fresh steps taken, are inconsistent with the procedural right relied on. Here, the fresh steps taken are not inconsistent with the application to set aside.

[Judgment in default set aside.]

Legislation referred to:
Rules of the High Court 1980, O. 13 r. 7, O. 14, O. 56 r. 3, O. 62 r. 9

For the defendant/applicant - P.S. Ranjan; M/s. Ng Ek Teong & Partners
For the plaintiff/respondent - Tan Jin Chor; M/s. Tan Jin Chor & Co.

JUDGMENT

VC George J:

The writ was caused to issue on 29 April 1982. On behalf of the plaintiff judgment in default was sought and obtained on 10 June 1982.

The affidavit of service of the writ and statement of claim was affirmed by one Thinagaran, clerk in the employment of the solicitors for the plaintiff and was filed towards entering judgment in default and is enclosure (2) in the Court file.

On 4 August 1982 the defendant purported to enter an appearance and after his solicitors were informed that in fact judgment in default had been entered took out an application (9) to have the judgment set aside. There is an endorsement on the summons that it would be supported by the affidavit of Ong Say Yaun affirmed on the 20 August 1982. Such an affidavit (8) was filed and served. The date allotted for the hearing of the summons was 12 July 1983. On the 28 September 1982 the defendant took out another summons for stay of execution of the judgment of 10 June 1982 until the disposal of the application to set aside the default judgment. This was also supported by an affidavit of the defendant.

In opposition to both applications was the affidavit (14) of Encik Tan Jin Chor, the solicitor having conduct of the matter for the plaintiff.

The two applications (9) and (11) were heard by me in chambers on 10 May 1983 and on the basis of what was drawn to my attention by counsel I concluded that there was no doubt in my mind that the writ and the statement of claim were duly served on the defendant on the 31 May 1982. I was also of the view that the only *bona fide* defence put up was only in respect of the interest claimed. I reduced the amount in the default judgment by RM89,247.35 being the amount claimed as interest and gave leave to defend in respect of that claim.

On 31 May 1983 the defendant having changed his solicitors took out an application (17) seeking *inter alia* leave to appeal to the Federal Court against my decision of 10 May 1983, alternatively for the time stipulated under O. 56 r. 3 of the Rules of High Court to be extended and that further arguments be heard.

I decided that I would hear further arguments in respect of the summons (9) and made the necessary orders which resulted in my hearing summons (9) in open Court on the 20 October 1983.

Encik P.S. Ranjan of Counsel for the defendant/applicant first dealt with the contention that the judgment was obtained irregularly in that the proof of service of the writ and statement of claim as required by the rules had not been provided to the Court. He argued that O. 13 r. 7 made it mandatory that there be an affidavit of service and that by O. 62 r. 9 the affidavit of service should be in the form prescribed as Form 137 (a) in the Rules of High Court.

He contended that the affidavit of service filed was not in Form 137 (a) and was inadequate and that therefore the default judgment was not regularly obtained and should be set aside. He then went on to contend that the defendant had a defence on merits and should be given the opportunity of defending the action in any event.

Encik Tan Jin Chor of Counsel for the plaintiff *inter alia* argued that at worst the affidavit of service not being in Form 137(a) was a mere irregularity which, particularly as the defendant has admitted that he was served with the writ by paragraph 3 (a) of his affidavit (8), should be ignored.

Other points taken by Encik Tan were that the irregularities relied on should be stated in the summons to set aside and this was not done in the instant case and amounted to a waiver, and in any event the defendant could not rely on the alleged irregularity in that fresh steps had been taken by the defendant in that he has argued the case on merits, has changed solicitors and has filed a further affidavit. Encik Tan then contended that there was no defence of merits.

While I entirely agree that the Court has a wide discretion to get round the non-adherence of many of the rules of procedure it would only do so if nothing significant turns on the non-adherence called in question.

In the instant case it is not so much the irregularity of not using Form 137(a) that is called in question but the contention that service of the writ was not effected as alleged on 31 May 1982. By paragraph 3 (a) of his affidavit (8) the defendant appears to accept that he was served with the writ when, according to him, his secretary handed it to him on the 27 of July or thereabout. That does not amount to an admission that the writ was served on 31 May 1982.

The question that arises is whether in fact the defendant was duly served with the writ on 31 May 1982. Encik Tan concedes that the defendant was not known to his clerk the process server. The clerk had information as to where the defendant was to be found at Supreme House. It does not necessarily follow that it was the defendant who was served on the 31 May 1982.

The Court has to be vigilant against judgment being given in default and should insist on a strict observation of the relevant rules. Form 137 (a) requires the deponent to state the basis for concluding that the person served was in fact the person to be served. The format of the form suggests that the basis is that the person to be served was personally known to the process server or had been pointed out to him or had admitted to him that he was the person to be served. Thinagaran's affidavit of service leaves out this important aspect of the service. Looking at Thinagaran's affidavit (I had not done so when I initially heard this matter in chambers and had relied on the certificate of non-appearance) in the light of what had been deposed to by the defendant and his secretary I am left in some doubt as to whether in fact it was the defendant who was served with the documents on that 31 May 1982.

Accordingly the matter does not rest on a question of mere irregularity of the usage of procedures and forms but on a fundamental question of whether in fact the defendant had been served with the writ and statement of claim. And since there is a doubt as to whether it was the defendant who was served there was no basis for entering judgment in default when it was entered on 10 June 1982.

Accordingly unless he has waived his right to have the judgment set aside or for other reasons is not entitled to ask for the judgment to be set aside, the defendant is entitled to have the judgment set aside.

That the irregularities relied on should be stated in the summons is an irregularity that can be cured and was cured by what was relied on being stated in the affidavit referred to in the summons.

Now, while I agree that in certain circumstances the taking of fresh steps could put paid to a party's procedural rights the taking of such steps can be invoked successfully only if the fresh steps taken are inconsistent with the procedural right relied on. In the instant case the

fresh steps said to have been taken by the defendant are not only not inconsistent with the application to set aside the default judgment but were taken towards getting the judgment set aside.

One other matter that is left is the issue of defence of merits. In view of the conclusions I have arrived at on the issue of service of the writ the question of whether there is a defence of merits is not relevant. In any event I make no pronouncement on it as there is every probability that the question has to be gone into in an Order 14 application.

The judgment in default entered on 10 June 1982 is set aside. The time for delivery of a statement of defence is extended to 2 weeks from the date hereof. I direct that any application for summary judgment under O. 14 be given an early date of hearing. The plaintiff will pay the cost of and incidental to this application.

Also found at [1984] 1 CLJ 188